TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 560.

THE UNITED STATES, APPELLANT,

vs.

FRANK Y. ANDERSON AND WILLIAM J. CAMERON, TRUSTEES, &C., AND THE ALABAMA STATE LAND COMPANY.

APPEAL FROM THE COURT OF CLAIMS.

FILED JANUARY 21, 1904.

(19211.)

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INDEX.

	Original.	Print.
Caption	1	1
Original petition filed	1	1
Amended petition	1	1
Traverse	11	6
Findings of fact	12	7
Conclusion of law	16	11
Memorandum as to no opinion	16	11
Judgment	17	11
Application for appeal	18	11
Allowance of appeal	18	11
Clerk's certificate	19	12

18127—04

1 In the Court of Claims.

FRANK Y. ANDERSON AND WILLIAM J. CAMERON, trustees of the lands of the railroad lately known as the Alabama and Chattanooga Railroad, who sue for the use and benefit of the Alabama State Land Company, and The Alabama State Land Company,
vs.
THE UNITED STATES. } No. 21315.

I. *Petition and amended petition.*

The claimants filed their original petition on the 4th day of May, 1899. Subsequently, to wit, on the 18th day of December, 1899, the claimants, by leave of court, in lieu of said original petition, filed their amended petition, which is as follows:

Amended petition, filed December 18, 1899.

To the Honorable the Court of Claims:

Your petitioners, the claimants herein, respectfully represent:

1. That petitioner, The Alabama State Land Company, is an incorporated company under the laws of the State of Alabama, with full
2 power and authority to acquire, hold, and dispose of the title to real property, and to sue and be sued.

That your petitioners, Frank Y. Anderson and William J. Cameron, are the trustees of the lands of the railroad lately known as the Alabama & Chattanooga Railroad, under the provisions of an act of the general assembly of Alabama, approved February 23, 1876, known as the "Debt settlement act" (acts Alabama, 1875–6, p. 130), and under a deed made pursuant to said act on February 8, 1877, by George S. Houston, governor of the State of Alabama, conveying the lands granted to said railroad company to John Swann and John A. Billups, trustees, in and upon certain trusts and uses therein mentioned; and are the successors of said Swann and Billups, trustees, deceased; and they join and sue in this action for the sole use and benefit of the Alabama State Land Company, the beneficial owner of the lands hereinafter particularly mentioned as having been trespassed upon and despoiled of iron ore and lime rock, for which the United States has been paid the sum of fifteen thousand dollars, which money is the subject-matter of this action, as hereinafter shown.

That they and their predecessors, Swann and Billups, as trustees, as aforesaid, held all the right, title, and interest in the said lands which was granted to the State of Alabama by the United States, in the manner and for the uses hereinafter stated, in trust, for the use and benefit of the beneficial owner thereof, the Alabama State Land Company, at the time the said trespass was committed, and until January 30, 1899, when they conveyed them to said Alabama State Land Company, the beneficial owner, as their duty as such trustees required them to do.

2. That the Congress of the United States, by an act approved June 3, 1856 (II Statutes, p. 17), made a grant of six alternate odd-numbered

sections of lands per mile, lying within limits of six sections in
3 width on each side of the railroad, to the State of Alabama to aid in the construction of a railroad, designated in section 6 of said act as "The Northeast and Southwestern Railroad, from near Gadsden to some point on the Alabama and Mississippi State line in the direction to the Mobile and Ohio Railroad, with a view to connect with said Mobile and Ohio Railroad;" and by a proviso to said section authorized the legislature of said State to designate the road to which the granted lands should be assigned.

It was provided by section 1 of said act that where the alternate odd-numbered granted sections, or parts of sections, of lands lying within the six-mile limits of the road had been sold by the United States, or the right of preemption had attached to the same at the time the line or route of the road was definitely fixed, other vacant and unappropriated odd-numbered sections, or parts of sections, of lands lying in the nearest tier of sections outside of the six-mile limits, and within fifteen miles of the line of said road, could be lawfully selected in lieu thereof by selecting agents appointed by the governor of said State, which selections should be approved by the Secretary of the Interior. (Vide sec. 1, 11 Stat., supra.)

By section 4 of said act it was provided that a quantity of land not exceeding one hundred and twenty sections, and included within a continuous length of twenty miles of the road, might be sold (when the line of the road was definitely fixed), and when the governor of said State should certify to the Secretary of the Interior that twenty continuous miles of road had been completed, then another quantity of lands, not exceeding one hundred and twenty sections, and within like limits, could be sold, and so on until the whole road was completed; and the following express condition was annexed to the grant: "And if any of
4 said roads is not completed within ten years, no further sale shall be made, and the lands unsold shall revert to the United States." (Vide sec. 4, 11 Stat., supra.)

It was also provided by section 3 of said act: "And the said railroads shall be and remain public highways for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States."

It was further provided by section 5 of said act: "That the United States mail shall be transported over said roads, under the direction of the Post-Office Department, at such price as Congress may, by law, direct; provided, that until such price is fixed by law, the Postmaster-General shall have the power to determine the same."

By joint resolution of the legislature of Alabama, approved January 30, 1858, the State accepted the grant on the same terms and conditions and restrictions imposed by the granting act, and granted the lands to the Northeast and Southwest Alabama Railroad, a body corporate existing under the laws of Alabama, "to be used and applied by said company upon the terms, conditions, and restrictions in said act of Congress contained." (Laws of Alabama, 1857–1858, p. 430.)

That a map of definite location of the line or route of said railroad was filed by said company in the Department of the Interior and approved by the Secretary thereof on or about October 11, 1858, whereby said line

or route become "definitely fixed," and the grant at once attached to the lands in the six mile or granted limits thereof, which were vacant on that date; and the vacant lands lying within the fifteen mile, or indemnity limits, were, at the same time, all withdrawn from sale and settlement, under the public land laws, by the Commissioner of the General Land Office, under the order of the Secretary of the Interior.

3. That the Northeast and Southwest Alabama Railroad was consolidated with the Wills Valley Railroad, mentioned in the 1st section of the act of Congress of June 3, 1856 (II Stat., p. 17), and reincorporated under the name of the Alabama and Chattanooga Railroad Company by acts of the legislature of Alabama approved October 6, 1868, and November 17, 1868. (Acts of Alabama, 1868, pp. 207, 345.)

The last-named railroad was completed, equipped, and in operation within the time prescribed by the act of Congress of June 3, 1856, aforesaid, as renewed by an act of Congress approved April 10, 1869 (16 Stat., p. 45), and become the beneficial owner of the granted lands aforesaid. Said railroad is now known as the Alabama Great Southern Railroad.

4. That said railroad was fully constructed within the time prescribed by law, and has always been, and is now, a public highway, free and open to the use of the United States for the transportation of the property and troops of the United States without toll or charge; and the mails of the United States have been and are now transported at the reduced price fixed by law for land-grant railroads, and every condition prescribed by Congress in the original grant, law, and contract has been fully performed by the State of Alabama, its grantees and assigns.

5. That the whole amount of odd-numbered sections of lands granted by Congress to aid in the construction of said Northeast and Southwest Alabama Railroad as aforesaid was, in round numbers, 660,000 acres; and the whole amount of odd-numbered sections and parts of sections found to be vacant and subject to the grant at the time the line of the road was definitely fixed, lying within the six mile or granted limits thereof, was found by the Secretary of the Interior to be, in round numbers, 141,000 acres, leaving a deficiency of lands to be supplied from the fifteen mile or indemnity limits of said road of 519,000 acres; and that the whole amount of vacant odd-numbered sections and parts of sections lying within said fifteen mile or indemnity limits, both approved and unapproved, was found by said Secretary to be less than 238,000 acres, from which to satisfy the losses of lands in the granted limits aforesaid, and making a deficiency of indemnity lands, and a deficiency in the grant itself, of more than 281,000 acres, which deficiency had existed from the time the line of the road was definitely fixed, and the lands were withdrawn in 1858, as aforesaid, and exists now.

That the adjustment of said land grant was made by the Commissioner of the General Land Office, under the direction and with the authority and approval of the Secretary of the Interior, on or about March 15, 1897, pursuant to an act of Congress for that purpose, approved March 3, 1887. (24 Stat., p. 556.)

6. That on December 30, 1887, a selecting agent, duly appointed by the governor of Alabama, selected the following-described tracts of land

lying within the indemnity limits of said railroad, in lieu and place of the tracts described, lying within the granted limits thereof, which had been disposed of by the United States, and thereby lost in place to the grantee and its assigns, to wit:

The west half of southeast quarter of section twenty-one, township fourteen south, range one west, selected in lieu of the north half of northeast quarter section thirty-five, township fourteen south, range one east, and the west half of northwest quarter of section twenty-seven, township fourteen south, range one west, selected in lieu of the south half of northeast quarter section thirty-five, township fourteen south, range one east, in Blount County, Alabama, which said tracts of land were selected, as aforesaid, in part satisfaction of said grant.

That said selecting agent, at the same time, tendered to the United States land officers at Huntsville, Alabama, all of the lawful fees
7 and charges due in the selection of said lands, but said officers wrongfully rejected said selection of lands so made as aforesaid, and an appeal was taken from their action to the Commissioner of the General Land Office, who, after many years of delay, reversed the decision of said officers, and instructed them to allow the selection of the lands to be made by said agent, and said selection was allowed by said officers on March 13, 1896, and the fees and charges of said officers were paid by said agent, and a list of said lands was approved by the Secretary of the Interior on April 10, 1896, and the legal title thereto, which had theretofore been held in trust by the United States for the use and benefit of the grantees of the State of Alabama and their assigns, passed from the United States to the State of Alabama, for the use and benefit of the beneficial owners thereof under the grant.

7. That between the years 1888 and 1894, and after said tracts of land had been selected by the selecting agent of the State of Alabama, as aforesaid, the Tennessee Coal, Iron and Railroad Company, the De Bardebelen Coal and Iron Company, and J. W. Worthington and Company went upon said tracts of land with force and arms, and without color of right, and mined and quarried iron ore and lime rock of great value therefrom, and removed and converted the same to their own use. That after the approval of the lands, as aforesaid, suits were brought against said parties by the United States, at the instance and request of the Alabama State Land Company, to recover damages therefor, in the circuit court of the United States for the northern district, southern division of Alabama; which suits were compromised and settled by the payment into the Treasury of the United States by the defendants, on or about November 28, 1898, of the sum of fifteen thousand dollars, and the payment of the costs of said suits. Petitioners consented to said compromise, but at the same time claimed, and gave notice to the
8 officers of the Government, that they would insist upon their right to this money after it had been paid by the trespassers into the Treasury of the United States.

8. That your petitioner, the Alabama State Land Company, was the beneficial owner of all the right, title, and interest in said tracts of land, which was granted to, conferred upon, and acquired by the State of Alabama, by said act of Congress of June 3, 1856, at the time of their selection by the selecting agent of the State, as aforesaid; and at the time the iron ore and lime rock was mined, quarried, and removed from them,

as aforesaid; and at the time they were approved to said State for the benefit of its grantees and assigns, as aforesaid; and at the time the suits were commenced by the United States against said trespassers, as aforesaid; and at the time the United States received the said sum of fifteen thousand dollars from said trespassers, as the price of said iron ore and lime rock, which had been unlawfully taken from the said lands as aforesaid, by grant, purchase, and mesne conveyances from the State of Alabama, its grantees and assigns, made before and after the said lands were selected by the selecting agent of the State, as aforesaid, and approved by the Secretary of the Interior, as aforesaid, and is now the owner of them.

9. That on March, 17, 1899, your petitioner, the Alabama State Land Company, presented its claim for said sum of fifteen thousand dollars to the Secretary or the Treasury, and the same was returned to petitioner's attorney on or about March 25, 1899, with a letter signed by H. A. Taylor, Assistant Secretary, stating, in substance, that he was advised by the Solicitor of the Treasury that the Secretary of the Treasury had no jurisdiction in the case.

Now, therefore, the premises considered, your petitioner claims, to wit:

a. That said act of Congress of June 3, 1856, was, in fact, a

9 contract, as well as a law, between the United States and the State of Alabama, its grantees and assigns, whereby they were entitled to a title from the United States for every acre of vacant and unappropriated odd-numbered section and part of section of lands lying within the fifteen mile or indemnity limits of said railroad, from the time when the line of said road was definitely fixed, including the tracts trespassed upon, as aforesaid, and to the iron ore and lime rock contained therein; and to more than 281,000 acres of lands in addition thereto; that because of the fact of the deficiency of lands required to satisfy said grant within the six mile or granted limits, and the fifteen mile or indemnity limits of the road, the lands trespassed upon, as aforesaid, were, in fact, appropriated to the satisfaction of said grant at the time the trespass was committed, and the United States then held the legal title to them as a mere trustee for the State of Alabama and its grantees and assigns, without any beneficial interest in the lands or in the iron ore and lime rock contained in and taken from them by the trespassers, as aforesaid, and continued to so hold said lands in naked trust until they were approved by the Secretary of the Interior to the State of Alabama on April 10, 1896.

That, as a matter of fact, the United States had no beneficial title, claim, or interest in or to said lands at the time when the suits were brought against said trespassers, and at the time when the said sum of fifteen thouand dollars was paid into the Treasury of the United States by said trespassers, and the United States then had no right of property or ownership in the iron ore and lime rock for which said money was paid, and your petitioners had title thereto. Therefore, your petitioners claim that they have a just and lawful right to recover the said sum of fifteen thousand dollars in this action from the United States, and your petitioners ask judgment for the same.

10 b. Your petitioners, on the facts stated, claim and ask for judgment against the United States, for the sum of fifteen thousand dollars, for money had and received by the United States on or

about November 28, 1898, for the use and benefit of your petitioner, the said Alabama State Land Company.

c. Petitioners aver that no other person except petitioner, the Alabama State Land Company, is interested in this claim, and that no assignment or transfer of said claim, or any part thereof, has been made, except as herein stated; that your petitioners are justly entitled to the said amount of fifteen thousand dollars from the United States, after allowing all just credits and offsets; that petitioners are citizens of the United States, and have not in any manner voluntarily aided, abetted, or given encouragement to rebellion against the United States, and have at all times borne true allegiance to the same; and that every person and corporation under and through whom petitioners became the beneficial owner of the said claim are citizens of the United States, and have at all times borne true allegiance to the same, and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the United States, and that petitioners believe the facts stated in said petition to be true.

M. D. BRAINARD,
Attorney for Petitioners.

DISTRICT OF COLUMBIA, *ss:*

Before me, Arthur Browning, a notary public in and for the District of Columbia, personally appeared M. D. Brainard, who being by me first duly sworn, according to law, on oath deposeth and saith, that he is an attorney of this court and the attorney in fact for the petioners in this case, and that he has read the annexed petition, and that the facts stated therein are true to the best of his knowledge and belief.

M. D. BRAINARD.

Subscribed and sworn to before me, this 16th day of December, A. D. 1899.

[SEAL.] ARTHUR BROWNING,
Notary Public, District of Columbia.

11 II. *Traverse—Filed Nov. 9, 1903.*

In the Court of Claims of the United States, December term, A. D. 1903.

THE ALABAMA STATE LAND CO.
vs.
THE UNITED STATES. } No. 21315.

And now comes the Attorney-General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

L. A. BRADT,
Assistant Attorney-General.

12 III. *Findings of fact and conclusion of law filed by the court November 16, 1903.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

FINDINGS OF FACT:

I. That the petitioner, the Alabama State Land Company, is a legally incorporated company under the laws of the State of Alabama.

II. That Frank Y. Anderson and William J. Cameron, who are joined as parties to this action, are naked trustees, without any ownership in the lands out of which this action springs, or in the money, which is the subject-matter of the action, and they sue for the sole use and benefit of the Alabama State Land Company and not for their own use and benefit. (Acts Alabama, February 23, 1876. Acts 1875–1876, p. 130.) Testimoney of witness Anderson. Deed from Governor George S. H. Houston, of Alabama, to John Swann and John A. Billups, trustees, dated Feburary 8, 1877.

III. That by act approved June 3, 1856, Congress made a grant of lands to the State of Alabama of six alternate odd-numbered sections per mile, lying within limits of six sections in width on each side of the railroad, to aid in the construction of a railroad designated in section 6 of said act as "The Northeast and Southwestern Railroad, from near Gadsden to some point on the Alabama and Mississippi State line, in the direction to the Mobile and Ohio Railroad, with a view to connect with said Mobile and Ohio Railroad," and by a proviso to said section 6 authorized the State to designate the railroad to which said lands should be assigned.

That section 6 of the act of Congress of June 3, 1856 (II Statutes, pp. 17, 18), in addition to the grant to aid in the construction of the Northeast and Southwestern Railroad, afterwards known as the Alabama and Chattanooga Railroad, made a grant of lands to the State of Alabama of like character to aid in the construction of several other railroads, amongst which was a grant to the railroad named in said act as "the Central Railroad, from Montgomery to some point on the Alabama and Tennessee State line in the direction to Nashville, Tennessee," and now known as the South and North Alabama Railroad. That the Northeast and Southwestern Railroad, now known as the Alabama and Chattanooga Railroad, was definitely located opposite the lands in question on November 29, 1858, and the South and North Alabama Railroad was

13 definitely located opposite thereto on May 30, 1866, and that both of said railroads were constructed within the time required by law, and that the tracts of land involved in this action are within the common indemnity limits of both of said railroads.

That the time for the construction and completion of said railroad was extended by an act of Congress approved April 10, 1869, for the period of three years from and after that date. (II Statutes at Large, p. 17; 16 ibid., p. 45.)

IV. That it was provided in section 1 of said act of Congress of June 3, 1856, that where the alternate odd-numbered sections, or parts of sections, of lands lying within the six mile, or granted, limits of the road,

had been sold by the United States, or the right of preemption had attached to the same at the time the line or route of the road was definitely fixed, other vacant and unappropriated odd-numbered sections, or parts of sections, of lands lying in the nearest tier of sections outside of the six-mile limits, and within fifteen miles of the line of said road, could be selected in lieu thereof, by selecting agents appointed by the governor of said State, which selections should be subject to approval by the Secretary of the Interior. (II Statutes at Large, p. 17.)

V. That by joint resolution of the legislature of Alabama, approved January 30, 1858, the State accepted this land grant on the terms and conditions imposed by the granting act of June 3, 1856, and granted the lands to the Northeast and Southwest Alabama Railroad, a body corporate under the laws of Alabama, "to be used and applied by said company upon the terms, conditions, and restrictions in said act of Congress contained." (Acts of Alabama, 1857–1858, p. 430.)

VI. That the Northeast and Southwest Alabama Railroad was consolidated with the Wills Valley Railroad, mentioned in section 1 of the act of Congress of June 3, 1856, and reincorporated under the name of the Alabama and Chattanooga Railroad Company by acts of the legislature of Alabama, approved October 6, 1868, and November 17, 1868. (Acts of Alabama, 1868, pp. 207, 345.)

VII. That the lands involved in this action were then located in Demopolis, Alabama, land district, and were withdrawn from sale and settlement by telegrams and letters addressed to the proper land officers by the Commissioner of the General Land Office on June 19, 20, and 21, 1856, and the said orders of withdrawal were modified by the Commissioner by his letters of June 26, 1856, so as to allow preemption settlements and selections to be made on the lands up to the time the lines or routes of said road was definitely fixed.

VIII. That the map of definite location of the Northeast and Southwest Alabama Railroad was accepted by the Commissioner of the General Land Office on December 1, 1858.

IX. That under the provisions of an act of the legislature at Alabama approved February 11, 1870, the State loaned to the Alabama and Chattanooga Railroad Company two millions of dollars of the State's bonds to aid in the construction of the railroad, and received in exchange therefor an equal amount of the first mortgage bonds of the railroad company, secured by first mortgage on all of its property, "and all the right, title, interest, and estate which said company now has, or may hereafter lawfully acquire, in or to said lands."

14 X. That the company having made default in the payment of the interest on the bonds, the State, through its officers, took charge of the property of the company and after some years of litigation a compromise and settlement was made with the bondholders, which was ratified and confirmed by an act of the legislature of Alabama, approved February 23, 1876, commonly known as the "debt settlement act;" and under section 19 of this act George S. H. Houston, governor of Alabama, conveyed by deed to John Swann and John A. Billups, the trustees who had been appointed under said act, on February 8, 1877, "all the right, title, and interest which this State has, or is entitled to, in the lands and property described in said deed of mortgage, last named, executed by

said railroad company; and all the right, title, estate, and interest acquired by said State in the lands and property mentioned and described in said mortgage at the purchase under the decree of the district court of the United States for the middle district of Alabama, in the matter of bankruptcy of the Alabama and Chattanooga Railroad Company." That this conveyance of the lands was made for the benefit of the bondholders and the State, which was to receive 10 per cent of the proceeds of the sale of the lands, and the trustees acquired no personal property rights in the land thereby.

XI. That upon the death of John Swann, the trustee on behalf of the bondholders, under the debt settlement act of February 23, 1876, Frank Y. Anderson was appointed his successor by an act of the legislature of Alabama, approved November 29, 1890; and upon the death of John A. Billups, the trustee on behalf of the State, William J. Cameron was appointed his successor by the governor of Alabama on March 29, 1895; said Anderson and Cameron are now the legal trustees of said lands under the act of the legislature of Alabama, approved February 23, 1876, commonly known as the debt settlement act.

XII. That the Alabama State Land Company was incorporated on November 11, 1886, by the bondholders of the Alabama and Chattanooga Railroad Company, who were the beneficial owners of all the lands granted by Congress to aid in the construction of said railroad under the act of the legislature of Alabama, approved February 23, 1876, commonly known as the debt settlement act; and said bondholders and incorporators are now and have been the beneficial owners of said granted lands since they were conveyed to Swann and Billups, trustees, by the governor of Alabama on February 8, 1877.

XIII. That all of the money claimed to be due from the bondholders to the State of Alabama in section 19 of the debt settlement act of February 23, 1876, and in the act of the legislature of Alabama of February 20, 1883, was paid and satisfied in full by John Swann, representing the bondholders, on September 29, 1883, and that condition being performed, the act of the said legislature of February 20, 1883, in execution of the power of disposal of the granted lands by the State, become operative and of full force and effect. Thereafter the bondholders and stockholders of the land company were the sole beneficiaries of the lands under the trust.

15 XIV. That on December 30, 1887, the selecting agent of the State of Alabama made application in due and legal form to select the lands which are involved in this action, at the United States land office at Huntsville, Alabama, and tendered the legal fees and charges payable on said selection, viz: The W. ½ of SE. ¼ of section 21, township 14 south, range 1 west, selected in lieu and place of the N. ½ of NE. ¼ of section 35, township 14 south, range 1 east, a tract of land lying in the six-mile or granted limits of the road which had been disposed of by the United States prior to the definite location of the road, and also the W. ½ of NW. ¼ of section 27, township 14 south, range 1 west, which was selected in lieu and place of the S. ½ of NE. ¼ of section 35, township 14 south, range 1 east; another tract of land which had been disposed by the United States prior to the definite location of the railroad; and this selection was erroneously and improperly rejected

by the local land officers, and an appeal from their action was taken to the Commissioner of the General Land Office by said selecting agent, and their action was set aside by the Commissioner and directions given to allow the selection on February 25, 1896, and the selection was allowed by the local land officers on March 13, 1896, and was approved by the Secretary of the Interior on April 10, 1896, in list numbered 25, in lieu of the very same lost lands specified on the original selection.

XV. That the governor of Alabama conveyed the said lands to Frank Y. Anderson and William J. Cameron, trustees under the debt settlement act of February 23, 1876, on April 18, 1896, by proper conveyance, and said Anderson and Cameron, trustees, conveyed them to the Alabama State Land Company by their deed dated January 30, 1899, and the title is now vested in said company. (Acts of Alabama, February 10, 1876, p. 154; and of February 20, 1883, p. —.)

XVI. That after the selection of the lands and between the years 1888 and 1894 the Tennessee Coal, Iron and Railroad Company, the De Bardeleben Coal and Iron Company, and J. W. Worthington and Company went upon said lands with force and arms, and without color of right or title, and mined, shipped and removed from the W. ½ of NW. ¼ of section 27, township 14 south, range 1 west, a large quantity of iron ore of great value, which they converted to their own use; and said parties also went upon the W. ½ of SE. ¼ of section 21, township 14 south, range 1 west, and quarried and removed and converted to their own use a large quantity of lime rock of great value.

XVII. That the Acting Attorney-General of the United States by letter addressed to C. C. Harvey, vice-president of the Alabama State Land Company, on August 22, 1896, authorized the trustees of the lands, Anderson and Cameron, to bring suit against said trespassers in the name of the United States for the damages committed to said lands by them, but this permission was subsequently recalled and suits in the name of the United States were instituted against said parties by the United States attorney in the circuit court of the United States for the northern district, southern division, of Alabama, on February 8, 1897, and damages exceeding the sum of $260,000 were claimed therein by the United States and these suits were settled by compromise and were consolidated, and a judgment was entered by the court on November
16 25, 1898, in which the damages were remitted, it being admitted by the United States Attorney, in open court, that the defendants had paid into the Treasury of the United States the sum of $15,000, in full settlement of all demands under said compromise.

XVIII. That the claimants herein consented to the compromise with the depredators upon the payment of the sum of $15,000 into the Treasury of the United States, but claimed the said money, and notified the Attorney-General that they would insist on the money being paid over to the trustees for the benefit of the Alabama State Land Company.

XIX. That the official adjustment of this land grant made by the Land Department shows that there was a deficiency of lands in the six mile or granted limits of the railroad necessary to satisfy the grant of 523,244.87 acres and that 237,584.05 acres of this deficiency was supplied from the fifteen mile or indemnity limits of the grant, and that there is now a deficiency of vacant lands necessary to satisfy the grant in full of

285,660.82 acres, and this deficiency has existed since the grant become effective by the definite location of the line or route of the said railroad.

XX. That the reply of the Acting Postmaster-General, dated August 12, 1899, shows that this railroad has been treated as a land-grant railroad in the matter of the pay for transporting the mails of the United States, under the provisions of section 5 of the granting act of June 3, 1856, and that regular deductions have been made from the mail pay allowed to the road since July 1, 1876, under various acts of Congress.

CONCLUSION OF LAW.

The court decides as a conclusion of law, upon the foregoing findings of fact, that the claimant is entitled to a judgment against the United States for $15,000.00.

BY THE COURT.

The court filed no opinion in this case.

17 IV. *Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 16th day November, 1903, judgment was ordered to be entered as follows:

The court on due consideration of the premises find for the claimants, and order, adjudge, and decree that the said Frank Y. Anderson and William J. Cameron, trustees of the lands of the railroad lately known as the Alabama and Chattanooga Railroad, who sue for the use and benefit of the Alabama State Land Company, and the Alabama State Land Company do have and recover of and from the United States the sum of fifteen thousand dollars ($15,000).

BY THE COURT.

18 V. *Application for and allowance of appeal.*

From the judgment rendered in the above-entitled cause, on the 16th day of November, 1903, in favor of the claimants, the defendants, by their Attorney-General, on the 30th day of December, 1903, make application for and give notice of an appeal to the Supreme Court of the United States.

LOUIS A. PRADT,
Assistant Attorney-General.

Filed December 30, 1903.

JANUARY 5, 1904.

Ordered, that the appeal be allowed as prayed for.

BY THE COURT.

19 Court of Claims.

FRANK Y. ANDERSON AND WILLIAM J. CAMERON, trustees of the lands of the railroad lately known as the Alabama and Chat'anooga Railroad, who sue for the use and benefit of the Alabama State Land Company, and the Alabama State Land Company,

v.

THE UNITED STATES.

No. 21315.

I, John Randolph, assistant clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact and conclusion of law filed by the court, of the judgment of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 15th day of January, 1904.

[SEAL.]

JOHN RANDOLPH,
Asst. Clerk Court of Claims.

(Indorsement on cover): File No. 19211, Court of Claims. Term No. 560. The United States, appellant, vs. Frank Y. Anderson & William J. Cameron, trustees of the lands of the railroad lately known as the Alabama and Chattanooga Railroad, who sue for the use and benefit of the Alabama State Land Company, and the Alabama State Land Co. Filed January 21st, 1904. File No. 19211.

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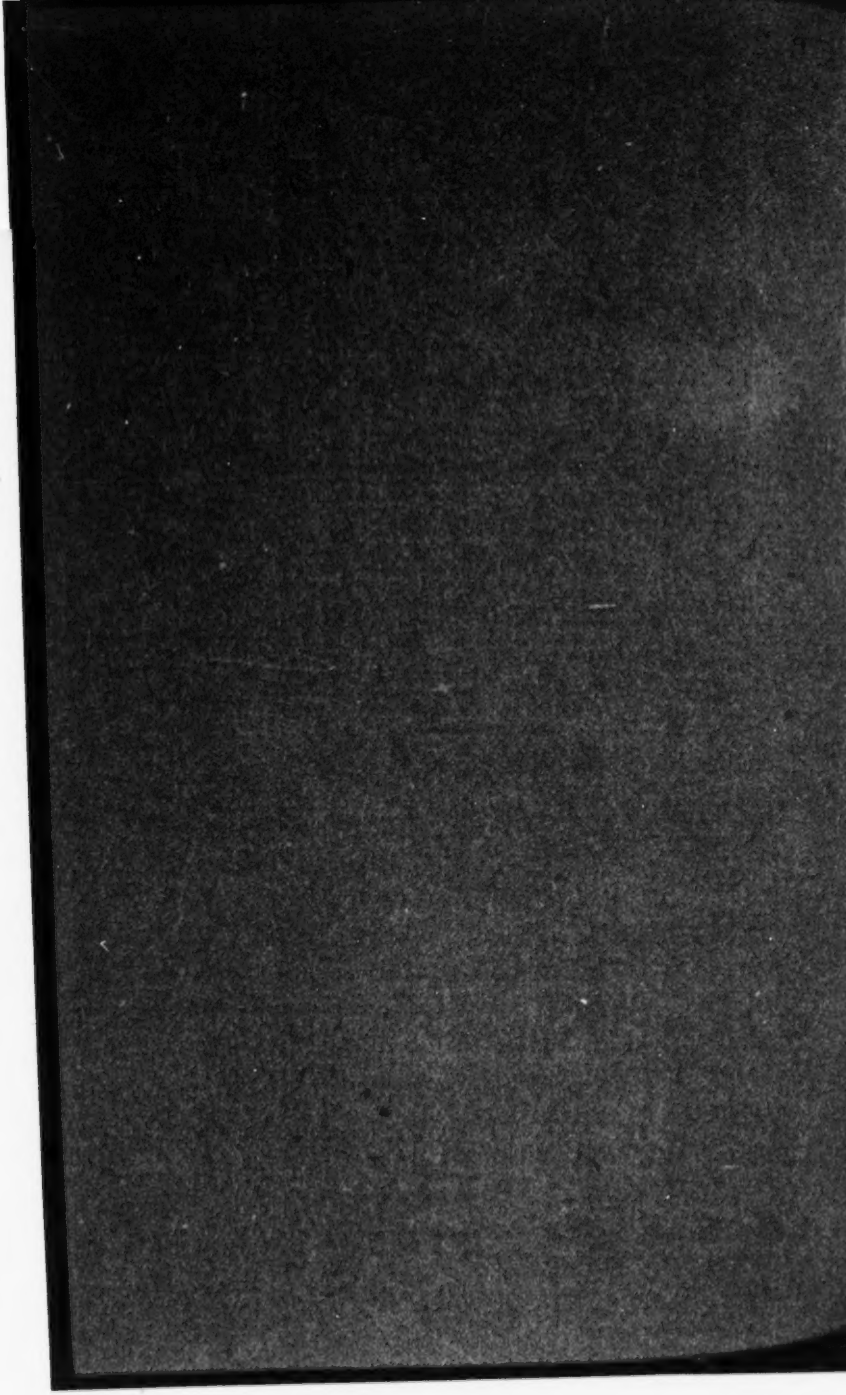

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, APPELLANT,
v.
FRANK Y. ANDERSON ET AL. } No. 560.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

In the act of June 3, 1856 (11 Stat. L., 17), Congress made a grant of public lands in the State of Alabama to aid in the construction of certain railroads in said State, among the roads projected in section 6 of the act being the one represented by the claimants in this case and another that extended from the city of Montgomery to some point on the Alabama and Tennessee State line, in the direction of Nashville, Tenn. The railroad represented by the claimants, specified in said section 6 as the Northeast and Southwestern Railroad, was first to be definitely located, viz, November 25,

1858, and the road from Montgomery in the direction of Nashville was definitely located May 30, 1866. By the acts of October 10, 1869 (16 Stat., 45), and March 3, 1871 (16 Stat., 580), the time within which the roads were required to be built was extended. Both were constructed, however, within the extended period of time.

The grant comprised "every alternate section of land designated by odd numbers, for six sections in width on each side of each of said roads." In case it should appear that the United States had, when the lines or routes of the roads were definitely fixed, sold any sections or any parts thereof, granted as aforesaid, or that the rights of preemption had attached to the same, then it was provided that selection should be made, "subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of preemption have attached."

When it became necessary to resort to the indemnity lands from which to make up deficiencies within the place limits, it was found that a part of said indemnity lands was within the indemnity limits common to the grants of both railroads, before mentioned, and among the lands so located within the common indemnity limits was the land out of which this suit arises.

The agents of the road represented by the appellees proffered a list of indemnity selections December 30, 1887, covering among others the two tracts here in question. The said list received the approval of the Secretary of the Interior April 10, 1896.

Between the years 1888 and 1894 certain trespasses were committed upon the lands involved, iron ore and lime rock being removed therefrom, for which suits were brought against the offending parties by the Government and the recovery, by compromise, of $15,000 damages effected. The claimants made demand for this money on the ground that they had already selected the lands; but the Government refused to transfer the amount because the title to the land was still in itself at the time the depredations were committed. Suit was then brought in the Court of Claims against the United States to recover in the name of the appellees the $15,000, and that court, without filing any opinion, rendered judgment for the appellees in the said sum.

ASSIGNMENTS OF ERROR.

The court below erred:

1. In refusing to dismiss the petition of the appellees and in rendering judgment thereon against the United States.

2. In rendering judgment against the United States upon the facts found.

ARGUMENT.

I.

The title to the lands within the place limits of the grant passed as soon as the map of definite location of the line or route of the proposed railroad was filed, but the title to lands within the indemnity limits, the selections of which were subject to the approval of the Secretary of the Interior, did not pass from the United States until the said selections had received the formal sanction of the Secretary, especially in view of the fact that the lands involved were within the indemnity limits common to two grants, and this notwithstanding the fact that if all the lands within the indemnity limits were selected they would not be sufficient to make up the deficiencies within the place limits of the particular railroad involved in this case.

The tracts involved in this case were lieu lands, or those within the limits from which the claimants could indemnify themselves because of deficiencies in the grant. The grant of lands within the place limits was *in presenti*, and the title passed from the United States as soon as the map of definite location of the line or route of the proposed railroad was filed with the Secretary of the Interior, but the title to the lieu lands did not pass until the particular selections of the same had been formally approved by the Secretary.

It is contended, because the quantity of land within the indemnity limits was insufficient to

make up the deficiencies, even if all were taken, that the Secretary of the Interior was not required to separate the lands from a mass of overplus indemnity lands and to exercise judgment or any powers in their nature judicial in selecting them, and that this case constitutes an exception to the rule that title to lieu lands does not pass until the selection shall have been approved by the Secretary. But until the Secretary, through his proper officers, could act in the premises, thoroughly examining all records appertaining, it could not be ascertained that all the lieu lands were required, or, if required, that they were free from prior claims. His action was not merely ministerial, but also judicial. It was his duty, in the first place, to ascertain whether there were any deficiencies in the lands granted to the State of Alabama which would need to be made up from the indemnity limits. He could not take the simple statement of the railroad company that such was the fact; and when it was ascertained that deficiencies did exist, it was necessary that the selections by the railroad company within the indemnity limits be examined to see if any other claims attached, in the event of which it would be necessary for the Secretary to act judicially and determine which was entitled to priority among the conflicting claims.

The effect to be given an indemnity selection proffered under a grant having an indemnity provision similar to that here in question, and the effect of the provision requiring the approval of

the Secretary of the Interior, were given full consideration by this honorable court in the case of the *Wisconsin Central Railroad Company* v. *Price County* (133 U. S., 496) and other cases therein cited. This same principle of the law governing indemnity lands has since been reaffirmed in other cases.

United States v. *Missouri, &c., Railway*, 141 U. S., 358, 375.

Hewitt v. *Schultz*, 180 U. S., 139.

Southern Pacific Railroad Company v. *Bell*, 183 U. S., 675.

Clark v. *Herington*, 186 U. S., 206.

In behalf of the appellees the case of the *St. Paul and Pacific Railroad Company* v. *Northern Pacific Railroad Company* (139 U. S., p. 19) has been cited, where the court said, respecting the indemnity lands: "There was, therefore, no occasion for the exercise of the judgment of the Secretary in selecting from them, for they were all appropriated."

The language of the court above cited in no wise refutes the oft-repeated doctrine set forth that the title to lieu or indemnity lands does not vest until the selection has been formally approved by the Secretary of the Interior. In the said case of the *St. Paul and Pacific Railroad Company* v. *Northern Pacific Railroad Company* the facts were not the same as in this case. Here it appears that the lands selected were within the limits of another railroad, the construction of which under the grant from the Government was authorized at the same

time as the grant authorizing the road represented in this case. The question of priority was to be determined. We therefore contend that in the case of the *St. Paul and Pacific Railroad Company* v. *Northern Pacific Railroad Company* the court in its opinion established no new rule governing the titles to indemnity lands, and there is nothing in the language of the grant now under consideration that should make it an exception to the general rule in such cases.

The court, as noted above in the citations given, subsequent to rendering its opinion in the case of the *St. Paul and Pacific Railroad Company* v. *Northern Pacific Railroad Company* (139 U. S., 19), reaffirmed the principle so elaborately set forth in the case of the *Wisconsin Central Railroad Company* v. *Price County* (133 U. S., 496), and referred to its opinion in that case as a statement of the general rule governing the title to indemnity lands.

The act of Congress granting the land was approved June 3, 1856, and the railroad was completed within the extended period of time, viz, April 10, 1872; but the selections of indemnity lands were not filed until December 30, 1887, more than fifteen years later, at which time it was found that the lands selected were within the indemnity limits common to two land grants embraced in one and the same act, and the Secretary of the Interior was called upon to determine to which road the said common indemnity lands belonged.

II.

Priority of right respecting indemnity lands is determined by priority of selection, where the selection is made according to law, and this fact, where the indemnity lands are common to two grants, can not be determined until an examination is made of all claims filed against the said indemnity lands, pending which the title to the indemity lands remains in the United States, and, until the title passes from the United States by the observance of all formalities touching the selection, moneys recovered because of trespasses upon the said indemnity lands between the time of filing the selections and the formal approval of the Secretary of the Interior belong to the United States.

As the court decided in the case of the *St. Paul and Sioux City Railroad Company and Another* v. *Winona and St. Peter Railway Company* (112 U. S., 720), within the indemnity limits common to two grants, neither priority of grant nor priority of location nor priority of construction gives priority of right, but this right is determined by priority of selection, where the selection is made according to law, and the claim which is entitled to priority can not be determined until after due examination. The fact that the deficiencies within the place limits were numerous makes manifest what would be expected in one of the older States, like Alabama, where entries involving almost every section of the public lands have at one time or another been made. That the Secretary's ap-

proval of a selection is necessary to make it complete according to law, and is the equivalent of a patent, is shown in the case of *Frasher et al.* v. *O'Connor* (115 U. S., 102).

In the case of *Barden* v. *Northern Pacific Railroad Company* (154 U. S., 288), it was decided that the title to mineral lands did not pass if the minerals were discovered before the selections had been formerly approved by the Secretary of the Interior, although they might have been developed after all preliminary proceedings had been observed and after the grantee company had done all that was incumbent upon it to be done in earning title to the lands.

In the said case of *Barden* v. *Northern Pacific Railroad Company* the court said:

> It is the established doctrine, expressed in numerous decisions of this court, that wherever Congress has provided for the disposition of any portion of the public lands, of a particular character, and authorizes the officers of the Land Department to issue a patent for such land upon ascertainment of certain facts, the Department has jurisdiction to inquire into and determine as to the existence of such facts, and in the absence of fraud, imposition, or mistake its determination is conclusive against collateral attack.

The question of the character of the lands does not enter into this case, but there were other

questions to be considered by the Secretary of the Interior involving the rights of two railroads before he could decide as to the title to them.

If the claimants did not have title to the lands until the indemnity selections were finally approved by the Secretary, viz, April 10, 1896, then under the decision of the court in the case of the *United States* v. *Loughrey* (172 U. S., 206, 211, 212), the approval of the Secretary carried with it no right of action for prior trespasses or infringements.

LOUIS A. PRADT,
Assistant Attorney-General.

GEO. H. WALKER,
Assistant Attorney.

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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 560.

THE UNITED STATES, APPELLANT,

vs.

FRANK Y. ANDERSON AND WILLIAM J. CAMERON, TRUSTEES, AND THE ALABAMA STATE LAND COMPANY,
APPELLEES.

Appeal from the Court of Claims.

BRIEF FOR THE APPELLEES.

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33097

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Appeal from the Court of Claims.

BRIEF FOR THE APPELLEES.

Statement of the Case.

The appeal in this case is taken from the judgment of the Court of Claims, which awarded to the defendants in error a judgment for the sum of $15,000, for money received by the United States from certain trespassers for iron and limestone which they had illegally taken from lands, the title to which is owned in fee simple by the appellees.

The material facts in the case are these:

By Act approved June 3, 1856, Congress made, amongst others, a grant of lands to the State of Alabama of six

odd-numbered sections per mile, and lying within six sections in width on each side of the railroad, to aid in the construction of a railroad designated in section six of said Act as "the Northeast and Southwestern Railroad, "from near Gadsden to some point on the Alabama and "Mississippi State line, in the direction to the Mobile and "Ohio Railroad, and with a view to connect with said "Mobile and Ohio Railroad," and the same section of said law authorized the State of Alabama to designate the railroad to which said lands should be assigned. (11 Statutes, p. 17; Record, p. 7.)

The Act of June 3, 1856, required the construction and completion of the railroad within ten years under penalty of forfeiture of the grant, but the time for the construction of the road was extended by an Act of Congress approved April 10, 1869, for the period of three years from and after that date. (16 Statutes, p. 45.)

By section 1 of said Act of Congress of June 3, 1856, it was provided that where the alternate odd-numbered sections or parts of sections of lands within the six-mile or granted limits of the road had been sold by the United States, or the right of pre-emption had attached to the same at the time the line or route of the road was definitely fixed, "then it shall be lawful for any agent or agents, to be "appointed by the governor of said State, to select from "the lands of the United States nearest to the tiers of "sections above specified, so much land, in alternate sec- "tions, or parts of sections, as shall be equal to such lands "as the United States have sold, or otherwise appropriated, "or to which the rights of pre-emption have attached." The selections so made were required by said Act to be approved by the Secretary of the Interior. (11 Statutes, p. 17.)

The map of definite location of the Northeast and Southwest Alabama Railroad, embracing the lands involved in this action, was filed in the Land Department on No-

vember 29, 1858, and accepted by the Commissioner of the General Land Office on December 1, 1858. (Record, pp. 7, 8.)

Said railroad was constructed and completed within the time required by said Act of June 3, 1856, as amended by the Act of April 10, 1869. (11 Statutes, p. 17; 16 *id.*, p. 45.)

That the official adjustment of this land grant made by the Land Department shows that there was a deficiency of lands in the six-mile or granted limits of the railroad necessary to satisfy the grant of 523,244.87 acres, and that 237,584.05 acres of this deficiency was supplied from the fifteen-mile or indemnity limits of the grant, *and there is now a deficiency of vacant lands necessary to satisfy the grant in full of 285,660.82 acres, and this deficiency has existed since the grant become effective by the definite location of the line or route of the said railroad.* (Record, p. 10, par. 19.)

The record shows that on December 30, 1887, the selecting agent of the State of Alabama made application in due and legal form to select the lands which are involved in this action in part satisfaction of the aforesaid grant to said railroad, at the land office at Huntsville, Alabama, and tendered to the land officers the legal fees and charges payable on said selection, but said officers erroneously and improperly rejected said selection, and an appeal from such action was taken by the agent of the State to the Commissioner of the General Land Office, who on February 25, 1896, reversed the erroneous action of the Huntsville land officers and directed that the selection as presented eight years previously should be allowed; and said selection was allowed by the said local land officers on March 13, 1896, and the Secretary of the Interior approved the same on April 10, 1896. (Record, pp. 9, 10.)

That the governor of Alabama conveyed the said lands to Frank Y. Anderson and William J. Cameron, trustees under the debt settlement Act of February 23, 1876, on April 18, 1896, by proper conveyance, and said Anderson and Cameron, trustees, conveyed them to the Alabama State Land Company by their deed dated January 30, 1899, and the title is now vested in said company, the appellee in this action. (Record, p. 10.)

After the selection of these lands by the agent of the State of Alabama, and between the years 1888 and 1894, the Tennessee Coal, Iron and Railroad Company, the DeBardeleben Coal and Iron Company, and J. W. Worthington and Company went upon said lands with force and arms, and without color of right or title, and mined and removed from the W. ½ of N. W. ¼ of section 27, township 14 south, range 1 west, a large quantity of iron ore of great value, which they converted to their own use; and said parties also went upon the W. ½ of the S. E. ¼ of section 21, township 14 south, range 1 west, and quarried and removed and converted to their own use a large quantity of lime rock of great value. (Record, p. 10.) That the Acting Attorney-General of the United States by letter addressed to C. C. Harvey, vice-president of the Alabama State Land Company, dated August 22, 1896, authorized the trustees of the lands, Anderson and Cameron, to bring suit against said trespassers for the damages committed on said lands by them, in the name of the United States, but this authority was subsequently recalled and suits in the name of the United States were instituted against said parties by the United States Attorney, in the Circuit Court of the United States for the northern district, southern division of Alabama, on February 8, 1897, and damages exceeding the sum of $260,000 were claimed therein by the United States, and these suits were compromised and settled, and a judgment

was entered by the court on November 25, 1898, in which the damages were remitted, it being admitted by the United States Attorney, in open court, that the defendants had paid into the Treasury of the United States the sum of $15,000 in full settlement of all demands under said compromise. (Record, p. 10.)

The Alabama State Land Company consented to the compromise with the depredators upon the payment of the sum of $15,000 into the Treasury of the United States, but claimed the said money, and notified the Attorney General that they would insist on the money being paid over to the Trustees for the benefit of the Alabama State Land Company. (Record, p. 10.)

ARGUMENT.

The land grant under consideration was made by Congress upon certain conditions, precedent and subsequent, which are specified in the grant. As to the lands in the six-mile or granted limits the grant was *in presenti*, and took effect as a present grant upon the filing of the map of the definite location of the road. (Schulenberg *vs.* Harriman, 21 Wallace, p. 44.) The lands which are involved in this case are what is commonly known as indemnity lands, and are located within the common overlapping indemnity limits of the grant to the State of Alabama to aid in the construction of the Northeast and Southwestern Railroad, afterwards known as the Alabama and Chattanooga Railroad, and the railroad known as the South and North Alabama Railroad. (Record, p. 7.)

The South and North Alabama Railroad never made any legal selection or claim to the lands in question, and there is no evidence that there was any deficiency of lands in that grant which would operate to place it on a common

legal level with the Alabama and Chattanooga Railroad grant, in which there was a large deficiency of lands, and said company is not a party to this action, and the fact that the lands involved in this suit were within the common indemnity limits of the two roads is of no importance whatever in the disposition of this case.

On December 30, 1887, the selecting agent of the State of Alabama made application in due and legal form to select the lands involved in this action at the United States land office at Huntsville, Alabama, for and on account of the Alabama and Chattanooga Railroad grant, and tendered to the land officers the legal fees and charges on said selection, and this selection was erroneously and improperly rejected by said officers, and an appeal was taken from their action to the Commissioner of the General Land Office. This legal and valid selection of the lands and the appeal taken by the selecting agent of the State of Alabama was allowed to sleep in the office of the Commissioner of the General Land Office without action for a period of more than eight years, when on February 25, 1896, the Commissioner by his decision sustained the appeal and directed the local land officers to allow the selection, and it was allowed by said officers on March 13, 1886, as originally made. This list of selections was approved by the Secretary of the Interior on April 10, 1896, and such approval was, in legal effect, the same as a patent issued for the land.

Fraser *vs.* O'Connor, 115 U. S., 102;
Williams *vs.* United States, 138 U. S., 514.

It was during this period of wrong, and delay on the part of the land officials, that the trespassers went upon the land and despoiled it of the iron and limestone for which the government received the $15,000 from the trespassers, which is the cause of this action.

In this case, in the selection of the land, the selecting agent of the State performed every legal act which the law required should be performed in order to perfect the title of the Alabama and Chattanooga Railroad to the land, and the legal selection of the land was erroneously and improperly rejected by the local land officers. (Record, p. 9.)

The law applicable to such a state of facts as this was made clear by the decision of this court in the case of Lytle *vs.* Arkansas, in which the record showed that one Nathan Cloyes had made a legal application to make a pre-emption entry for land on which he had made settlement, and the local land officers erroneously and improperly rejected his application and allowed the entry of the land by others.

This court in disposing of that case said:

"It is a well-established principle, that where an individ-
"ual in the prosecution of a right does every thing which
"the law requires him to do, and he fails to attain his
"right by the misconduct or neglect of a public officer,
"the law will protect him."

9 Howard, p. 333.

Not less uncertain is the judgment of this court in the case of Shipley *vs.* Cowan, in which it was said:

"The party who takes the initiatory step in such cases,
"if followed up to patent, is deemed to have acquired the
"better right as against others to the premises. The patent
"which is afterwards issued relates back to the date of the
"initiatory act, and cuts off all intervening claimants.
"Thus, the patent upon a State selection takes effect as
"of the time when the selection is made and reported to
"the land office; and the patent upon a pre-emption settle-
"ment takes effect from the time of settlement as disclosed
"in the declaratory statement or proofs of the settler to
"the register of the local land office."

91 U. S., pp. 330, 337.

It is claimed by the defendants in error that the rights of the Alabama and Chattanooga Railroad to this land were in nowise legally impaired by the wrongful act of the local land officers in rejecting the selection of the land when presented by the agent of the State of Alabama on December 30, 1887, because the Commissioner of the General Land Office by his decision of February 25, 1896, decided that the selection was legal when presented, and this decision being the official action of an official invested by law with powers in their nature judicial, such decision of this question was final, and the selection of the land become thereby a good and valid selection thereof, in law, from the time it was presented at the local land office.

Shipley *et al. vs.* Cowan *et al.*, 91 U. S., 330.

It is true, as a *general rule* of construction, as stated in the brief of the appellant, that the legal title of the grantee company to indemnity lands is not vested in the grantee, and remains in the United States until the lands are selected and the selection is approved by the Secretary of the Interior.

Wisconsin Central Railroad Company *vs.* Price County, 133 U. S., p. 496;

U. S. *vs.* Missouri, Kansas and Texas Railway, 141 U. S., 358.

There is another rule of law relating to indemnity land selections which is not mentioned in the brief of the appellant which is of the first importance in the consideration of the questions at issue in this case.

If the government held the legal title to these lands at the time the selection was presented, that title certainly passed to the grantee by the approval of the selection by the Secretary of the Interior on April 10, 1896, and had relation to the date of the grant, so as to cut off all inter-

vening rights or claims, and the present claim of the government to this money grows out of the wrongful acts of third parties, which the government permitted to be committed. If the trespass had not been committed the iron ore and limestone would still form part of the soil, and the government ought not to profit by the wrongful acts and negligence of its officers, and the spoliation of these lands by lawless men, in the face of its grant and contract with the State of Alabama, by which Congress granted these lands to the State without any exception being made in the grant of lands containing iron ore, limestone, or any other mineral. This grant was made prior to the enactment of the mining laws of July 26, 1866 (14 Statutes, p. 253), and contained no exception of mineral lands, such as was embraced in the later grants to aid in the construction of railroads, and that class of lands, therefore, passed under this grant.

The approval of the selections by the Secretary of the Interior had relation to the date of the grant, or at least to the date when the legal claim was asserted to them by their selection by the agent of the State.

The doctrine of relation whereby when a title is acquired it is held to relate back to a prior period, "for the purposes of justice," is well settled; as said by this court in the case of Gibson *vs.* Chouteau: "So far as it is necessary "to protect the rights of the claimant to the land, and the "rights of parties deriving their interests from him."

13 Wallace, p. 100;
Ross *vs.* Barland, 1 Peters, p. 655;
Landes *vs.* Brant, 10 Howard, p. 348;
Lessee of French *vs.* Spencer, 21 *ibid.*, pp. 228, 240;
Grisar *vs.* McDowell, 6 Wallace, p. 363;
Beard *vs.* Federy, 3 *ibid.*, p. 478;
Lynch *vs.* Bernal, 9 *ibid.*, p. 315;

Stark *vs.* Starrs, 6 *ibid.*, p. 402;
Shipley *vs.* Cowan, 91 U. S., p. 330;
Heath *vs.* Ross, 12 Johns., p. 140;
Musser *vs.* McRea, 44 Minnesota, p. 343.

If the government held the legal title to these lands after the legal application to select them was made by the agent of the State on December 30, 1887, and until that selection was approved by the Secretary of the Interior on April 10, 1896, *it held that title in trust for the benefit of the beneficial owners of the land* under the grant to the State of Alabama, and it was its duty to protect them from spoliation by the trespassers, for the lawful claim which had then been made for them was afterwards fully sustained by the Commissioner of the General Land Office and the Secretary of the Interior.

The law is well settled that the trustee's position in such a case is that of agent for the grantor and his privies in estate, as well as for the *cestui que trust*, and in carrying out his trust he must avoid all partiality toward either side.

Graham *vs.* King, 50 Mo., 22;
Bales *vs.* Perry, 51 Mo., 449;
Sherwood *vs.* Saxton, 63 Mo., 78;
Meacham *vs.* Steele, 93 Ill., 135;
Little Rock, etc., Railroad *vs.* Huntington, 120 U. S., 160;
Adams *vs.* Cowen, 177 U. S., 471, 484.

A trustee cannot claim the trust property adversely to those for whom he acquired and for whom he holds it.

Union Pacific Railroad Co. *vs.* Durant, 95 U. S., 576.

A trustee cannot lawfully acquire trust property, either by purchase or exchange.

Wormley *vs.* Wormley, 8 Wheat., 421.

Generally, for an abuse of his powers, or a neglect to exercise proper diligence, the trustee is personally liable in damages to the party injured.

Murrell *vs.* Scott, 51 Texas, 520;
Sherwood *vs.* Saxton, 63 Mo., 78.

The Court of Claims in its judgment in this case found as a matter of fact established by the testimony presented that the official adjustment of this land grant made by the Land Department shows that there was a deficiency of lands in the six-mile or granted limits of this railroad necessary to satisfy the grant of 523,244.87 acres, and that 237,584.05 acres of this deficiency was supplied from the fifteen-mile or indemnity limits of the grant, *and that there is now a deficiency of vacant lands necessary to satisfy the grant in full of 285,660.82 acres, and this deficiency has existed since the grant become effective by the definite location of the line or route of the said railroad.* (XIX, Finding of Facts. Record, pp. 10, 11.)

It is claimed by the appellees that owing to the great deficiency of lands required to satisfy this grant, which deficiency existed from the time when the road was definitely located, in both the granted and the indemnity limits thereof, the lands which were trespassed on, and are thereby involved in this action, were legally appropriated from and after the definite location of the railroad, in 1858, for the use and benefit of the State of Alabama and its grantees, as decided by this court on a like state of facts in the case of St. Paul and Pacific Railroad Company *vs.* Northern Pacific Railroad Company, in which case the court said:

"As to the objection that no evidence was produced of "any selection by the Secretary of the Interior from the "indemnity lands to make up for the deficiencies found in "the lands within the place limits, it is sufficient to observe "that all the lands within the indemnity limits only made

"up in part for those deficiencies. There was, therefore, "no occasion for the exercise of judgment of the Secretary "in selecting them, for they were all appropriated."

139 U. S., pp. 1, 19.

Under this decision the lands which are involved in this action were legally appropriated for the benefit of the State of Alabama and its grantees at and before the time when the trespass was committed upon them, and the grantees had then a beneficial interest in them aside from the rights acquired by the selection of them and the adjudication by the Commissioner of the General Land Office that the selection was lawful, and the approval of said selection by the Secretary of the Interior.

The approval of the selection by the Secretary of the Interior under these conditions operated, it would appear, in the manner defined by this court in the case of Langdeau *vs.* Hanes, in which it was said:

"In the legislation of Congress a patent has a double "operation. It is a conveyance by the government when "the government has any interest to convey, but when "issued upon confirmation of a previously existing title it "is documentary evidence, having the dignity of a record, "of the existence of that title, or of such equities respect- "ing the claim as justify its recognition and confirmation."

21 Wallace, p. 529.

The suits by the United States against the trespassers which resulted in the compromise under which the trespassers paid to the United States the money which is involved in this action were brought in trover for the conversion of the iron ore and limestone which had been taken from the land, *on February 8, 1897, several months after the certification of the land, and at a time when the legal title to it was unquestionably vested in the grantee and its assigns.* (Record, p. 10.)

The United States had no property interest in the land at the time the suits were commenced, for it had previously conveyed away its title.

It had no interest in the iron and limestone which had been unlawfully taken from the land, because it had contracted and agreed with the State of Alabama by the Act of June 3, 1856, to convey the land, and the iron and limestone which formed part of it, to the State of Alabama and its grantees, if the conditions annexed to the grant were performed, and those conditions were all performed by the construction of the railroad within the time required by law.

Having no beneficial interest in the land at the time of the trespass, and no title and ownership to the land and the ore and limestone granted as part of it, and wrongfully taken from it, at the time the suits were commenced, the United States had no right to commence or maintain those actions unless it sued for the benefit of the owner.

It is only the actual owner of the converted property, or one who is in possession of it, and will be liable ultimately to the true owner for its value, who can maintain an action for its conversion.

Opinion of Lawrence, *J.*, in Webb *vs.* Fox, 7 T. R., 395;
Blackstone's Com., 389;
1 Chit. Pl., 16 Am. Ed., 167;
Cooper *vs.* Chitty, 1 Burr., 20;
Hunt *vs.* Holton, 13 Pick., Mass., 216;
American and Eng. Encyclopedia of Law, 1 Ed., Vol. 26, pp. 746, 747, 748, and cases there cited.

If these suits had been defended by the trespassers it is reasonable to presume, on this state of the law, that they could not have been maintained unless it had been shown

that the United States sued for the use and benefit of the grantee of the State of Alabama, to whom it was liable for allowing the trespass to be committed on the land.

In the case of Schulenberg *vs.* Harriman, in an opinion of this court delivered by the distinguished and lamented Justice Field, whose learning in the law of land titles will stand forever as a monument to his memory, it was said with reference to a trespass committed on granted land of like character to the grant under consideration:

"Whilst the timber was standing it constituted a part "of the realty; being severed from the soil its character "was changed; it become personalty, but the title was "not affected; it continued as previously the property of "the owner of the land, and could be pursued wherever it "was carried. All remedies were open to the owner which "the law affords in other cases of the wrongful removal or "conversion of personal property."

21 Wallace, pp. 44, 64.

In conclusion, it is respectfully submitted that the record conclusively shows that at the time of the grant, and at all times subsequent thereto, until after the land was selected by the agent of the State of Alabama, the converted property *was a part of the land.* The wrongful act of the local land officers in rejecting the legal selection of it by the agent of the State, and the long delay of the officers of the government in approving the selection and issuing the certified list, should not be allowed to defeat the substantial rights of the grantees of the State to acquire all that was covered by the grant and all that was covered by the selection; nor should the government profit by the delay of its officers prejudicial to the rights of the claimants; nor should the government retain a benefit which it never could have claimed *but for the wrong of the persons converting the property.* But for the trespass, the iron ore and lime rock would have remained a part of the land,

and the grantees of the State would now be its owner. That trespassers converted it, cannot, according to the terms of the grant and law of Congress, be the means of depriving the grantees of the State of that which they ought to have under the plain terms of the grant, nor of conferring a benefit on the United States which they would not otherwise have. The government should not profit by a wrong.

The government cannot lawfully take private property for public uses without due compensation, and the iron ore and limestone taken from this land was private property because it was granted to the State of Alabama as part of the land.

United States *vs.* Great Falls Mfg. Company, 112 U. S., p. 656.

The United States having in its custody fifteen thousand dollars rightfully belonging to the appellees, judgment should be rendered in their favor.

Gains *vs.* Miller, 111 U. S., 395;
Swift *vs.* United States, 111 U. S., 23.

Respectfully submitted.

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J. A. W. SMITH,
Attorneys for the Appellees.

Supreme Court of the United States.

No. 560.—October Term, 1903.

The United States, Appellant, vs. Frank Y. Anderson and William J. Cameron, Trustees, &c., and The Alabama State Land Company.	Appeal from the Court of Claims.

[May 16, 1904.]

The United States appeals from a judgment condemning it to pay fifteen thousand dollars. The essential facts stated in the findings are as follows:

In 1856 Congress granted to the State of Alabama public lands to aid in the construction of various railroads referred to in the first and sixth sections of the act. Among these was the Northeast and Southwestern Railroad, "from near Gadsden to some point on the Alabama and Mississippi State line, in the direction to the Mobile and Ohio Railroad, and with a view to connect with said Mobile and Ohio Railroad." The grant of land in place was six odd-numbered sections per mile and lying within six sections in width on each side of the railroad. The act in section 1 also contained a provision for indemnity lands, as follows:

"But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections or parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold, or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid, which lands (thus selected in lieu of those sold and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by odd numbers, as aforesaid, and appropriated as aforesaid) shall be held by the State of Alabama, for the use and purpose aforesaid: *Provided*, That the land to be so located shall in no case be further than fifteen miles from the lines of said roads, and selected for and on account of each of said roads."

The act, in section 6, moreover contained this proviso:

"That the lands hereby granted to said State for the purpose of constructing a railroad from the northeast to the southwestern portion of said State, lying northwest of Elyton, shall be assigned to such road as may be designated by the legislature of said State."

It was further in substance provided, in section 4, that if any of the authorized roads were not completed within ten years, all right of the State in and to the lands granted should cease, and they should revert to the United States. (11 Stat. c. 41, pp. 17, 18.)

By joint resolution of the legislature of the State of Alabama, approved January 30, 1858, the grant made by the act aforesaid was accepted, and land was granted by the State to the Northeast and Southwestern Alabama Railroad, a body corporate, existing under the laws of Alabama, to be used and applied by said company "upon the terms and conditions in said act of Congress contained." (Laws of Alabama, 1857 to 1858, p. 430.) In June, 1856, an order of withdrawal was made by the Land Department of all the lands which were thought to be embraced within both the place and indemnity limits, which withdrawal included the land to which this controversy relates. This order was modified a few days thereafter so as to allow settlements to be made on the lands prior to the time of the definite location of the road. Such definite location was made and accepted by the Commissioner of the General Land Office with the approval of the Secretary of the Interior, in December, 1858.

The Northeast and Southwestern Railroad was reincorporated by the State of Alabama in October, 1868, under the name of the Alabama and Chattanooga Railroad Company. (Acts of Alabama, 1868, pp. 207, 345.) In April, 1869, the time for the completion of the road, was extended by act of Congress for a period of three years from that date. (16 Stat. 45.) The road was completed within the extended time, in conformity with the law of Alabama and in compliance with the act of Congress.

In December, 1887, an agent, duly appointed by the Governor of Alabama for that purpose, selected certain lands in the indemnity limits in lieu of lands within the place limits, which had been lost to the grantee by sale or pre-emption. At the time of making the selections there were tendered to the proper land officers all legal fees and charges. The selections were rejected by the local officers and an appeal was taken to the Commissioner of the General Land Office. This appeal, however, was not acted upon for a considerable period of time; but finally in April, 1896, the appeal was decided in favor of the selections, which were approved, and the title consequently passed from the United States to the State of Alabama in trust for its grantees under the act of Congress. At the time of the definite location of the road there was a deficiency in the place limits of 519,000 acres, and the whole amount of the vacant or odd-numbered sections within the indemnity limits, both approved and unapproved, available to meet this deficiency, was less than 238,000 acres, leaving, therefore, on the face of the land office records, at the time of the definite location of the road, a deficiency of more than 281,000 acres. By various acts of the legislature of the State of Alabana and conveyances which are recited

in the findings, and which it is not necessary to reproduce, the plaintiffs below became the owners of the land patented by the United States, within the indemnity limits, as above stated. During the period, however, which intervened between the selections of land made by the agent of the State of Alabama and the approval of the selections by the Secretary of the Interior, certain persons went upon the lands selected and removed therefrom valuable iron ore and lime rock. After the approval of the selections the United States brought a suit to recover from the persons who had thus trespassed upon the lands the value of the product by them removed. The owners of the land, in pursuance of the selections, asserted a claim to the benefit of the recovery which might be made, but assented to a compromise made by the United States with the trespassers by which fifteen thousand dollars was paid to the United States as the value of the material taken from the land. The owners of the land at the time of the compromise protested that they alone were entitled to receive the sum paid to the United States and reserved their right to recover the same from the United States.

It is stated in the findings that a road known as the South and North Alabama Railroad, declared to be one of the roads enumerated in the sixth section of the act of Congress making the grant to the State of Alabama, was definitely located opposite the land in controversy on May 30, 1866, nearly eight years after the definite location of the Northeast and Southwestern Railroad, and was constructed within the time required by law. There is no finding, however, that a grant was ever made to the South and North Alabama Railroad by the State of Alabama, or that that road preferred any claim to the land in question.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

As there is no finding which tends even to establish any right at any time to the land in question in favor of the South and North Alabama Railroad, all consideration of that subject may be put out of view. Moreover, the existence of any supposed right in favor of that company is conclusively disposed of on this record by the finding as to the prior selection by the State of Alabama under the grant in aid of the Northeast and Southwestern Railroad and the approval of such selection by the Secretary of the Interior,

The Government makes no contention that if the title of the plaintiffs was of such a character as to entitle them generally to recover against the trespassers that the cause of action against the United States for the money collected by it from the trespassers is not one which is judicially cognizable. The sole contention of the Government is that the plaintiffs, after application for selections and before approval of the selections, had no such title to

the land as would have justified a recovery from the trespassers, and, *a fortiori*, therefore had no such title as would warrant their recovering from the United States the sum of money which it collected from the trespassers for the elements removed from the land during the period between the date of the application for selections and the approval of the same by the Secretary of the Interior. This contention is based upon the proposition that, whilst under the act in question the grant of land within the place limits may have been one *in præsenti*, the right to the indemnity lands did not vest in the grantee until approval of the selections by the proper officers of the Government; and hence the legal title was in the United States as to such lands pending action on the application for selections, and therefore at the time the trespass the United States was alone authorized to recover for the depredations committed. Unquestionably the general doctrine is that where approval by the officers of the Government of selections of indemnity land has been made a condition precedent to the right to take such lands, the legal title remains in the United States until divested by the approval of the selections. (*Oregon & California Ry. Co.* v. *United States*, No. 1, 189 U. S. 103.) In consonance with this doctrine it has also been decided that, until approval of selections within the indemnity limits, land embraced in applications for selections remains the property of the United States to such an extent that it cannot be taxed as the property of the applicants. (*Wisconsin Railroad Co.* v. *Price*, 133 U. S. 496.)

But even though it be conceded, *arguendo*, that the doctrine in question would allow rights to be acquired by third parties to the injury of the applicant after the making of the selections and pending approval thereof by the Government, it does not follow that it controls the controversy here presented. This results because on this record the rights of third parties are not involved, since the controversy concerns only the right of the United States to retain as against its grantees the proceeds recovered by it as the result of a trespass upon land after an application for the selection of such land and pending action thereon by the proper officers of the Government. Under these circumstances the case is one for the application of the fiction of relation, by which, in the interest of justice, a legal title is held to relate back to the initiatory step for the acquisition of the land. Many cases illustrating the doctrine in various aspects have been determined in this court.*

Indeed, this case is one coming peculiarly within the principle of relation, as the approval of the selections manifestly imported that at the time

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*Gibson *v.* Choteau, 13 Wall. 92, 100; Ross *v.* Barland, 1 Pet. 655; Landes *v.* Brant, 10 How. 348; Lessee of French *v.* Spencer, 21 How. 228, 240; Beard *v.* Federy, 3 Wall. 478; Grisar *v.* McDowell, 6 Ib. 363; Stark *v.* Starrs, 6 Ib. 402; Lynch *v.* Bernal, 9 Ib. 315; Shepley *v.* Cowan, 91 U. S. 92, 100.

of the application for selections the land in question was rightfully claimed by the applicant. And cogently does this become the case when it is considered that the findings establish that at the time the application for selection was made, on the face of the records of the land office, there was an enormous deficiency both in the place and indemnity lands. (*Shepley* v. *Cowan*, 91 U. S. 330, 337.)

Nor is the assertion well founded that this case is not a proper one for the application of the doctrine of relation because coming within the rule announced in *United States* v. *Loughrey*, (172 U. S. 206.) At the time of the trespass complained of in that case the United States had taken no step to assert its reversionary rights in and to the land trespassed upon, the legal title to which was in the State of Michigan at the time the trespass was committed. Here as we have seen the grantee had exercised his right to apply for selections within the indemnity limits and had in legal form requested the approval of the same by the Government. Everything therefore which the grantee was required by law to do to obtain the legal title had been performed. These facts bring this case within the principle decided in *Heath* v. *Ross*, (12 Johns. 140,) and *Musser* v. *McRae*, (44 Minn. 343,) referred to in the opinion of the court in the Loughrey case, (p. 218,) as not being inconsistent with the principle there applied. *Heath* v. *Ross* was an action of trover for timber cut between the application for and date of a patent from the State, and its ensealing and delivery by the Secretary of State. The title was held to relate back to the first act, so as to entitle the plaintiff to maintain an action against a mere wrongdoer, for the value of the timber cut and carried away in the meantime. *Musser* v. *McRea* was an action brought to recover the value of timber cut by trespassers from indemnity lands selected by the agent of certain railroad companies, intermediate the application for selection and the patenting of the lands. To permit a recovery, it was held that the title evidenced by the patent related back at least to the date of the application for selection. It was declared that the doctrine of relation was properly applied to the case, "for the advancement of justice, and to give the full effect to the grant it was intended to have." Among other cases relied upon by the Minnesota court as sustaining the application made of the doctrine was the decision of this court in *Landes* v. *Brant*, (10 How. 372.)

Concluding, as we do, that the money in question belongs to the appellee as the successor in interest of the party for whose benefit the application for selections was made, it results that the judgment of the Court of Claims must be

Affirmed.